74-1119

APR 8 1975
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2033

STATE OF ALABAMA, ET AL.,
Petitioners

v.

N. H. NEWMAN, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

JOSEPH D. PHELPS
Attorney for Respondents
815-830 Bell Building
Montgomery, Alabama 36102

Of Counsel:
ROBISON, BELSER, BREWER & PHELPS
815-830 Bell Building
Montgomery, Alabama 36102

TABLE OF CONTENTS

Page

Table of Authorities ii

Issues Presented 1

Statement of the Case 2

Response to Factual Portion of Petitioners' Statement of the Case 4

Evidence of Critical Medical and Treatment Deficiencies 4

Reasons for Disallowance of Writ 10

I. Three-Judge Court Is Not Required under 28 U. S. C. 2281 Where No State Statute Or Regulation Is Affected 10

II. State Prison Inmates Are Constitutionally Entitled to the Basic Elements of Adequate Medical Treatment 13

III. The Court of Appeals Correctly Affirmed the Remedial Action of the District Court 15

IV. Evidentiary Rulings of the District Court were Compatible with F. R. C. P. 43 (a) 18

Conclusion 20

TABLE OF AUTHORITIES

Page

Cruz v. Beto, 405 U. S. 319, 31 L. Ed 2d 263, 92 S. Ct. 1079 14

Haines v. Kerner, 404 U. S. 519, 30 L. Ed 2d 652, 92 S. Ct. 594 14

Newman v. State of Alabama, 349 F. Supp. 278 (M. D. Ala. 1972) 3

Newman v. State of Alabama, 503 F. 2d 1320 (5 Cir. 1974) 16

Procunier v. Martinez, ...U. S....., 94 S. Ct. 1800, 40 L. Ed 2d 224 (1974) 15

Robinson v. California, 370 U. S. 660, 82 S. Ct. 1417, 8 L. Ed 2d 758 14

Salem v. United States Lines Co., 370 U. S. 31, 82 S. Ct. 1119, 8 L. Ed 2d 313 (1962) 19

Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 28 L. Ed 2d 554, 91 S. Ct. 1267 17

Washington v. Lee, 263 F. Supp. 327 (M. D. Ala. 1966), aff'd per curiam, 390 U. S. 333, 88 S. Ct. 994, 19 L. Ed 2d 1212 (1968) 15

Wolff v. McDonnell, ...U. S....., 41 L. Ed 2d 935, 94 S. Ct. 2963 (1974) 11, 15

Statutes:

Title 28, U. S. C. § 2281 12

Title 45, § 3, Code of Alabama 1940 (Recompiled 1958) 12

FRCP 43 (a) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2033

STATE OF ALABAMA, ET AL,
Petitioners

v.

N. H. NEWMAN, ET AL,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ISSUES PRESENTED

I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT A THREE-JUDGE COURT IS NOT REQUIRED UNDER 28 U. S. C. 2281 WHERE NO STATE STATUTE OR REGULATION IS AFFECTED BY THE LITIGATION AND WHEN NO UNIFORM STATE PRACTICE EXISTED PRIOR TO THE LITIGATION.

II. WHETHER THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY FOUND THAT STATE PRISON INMATES

ARE CONSTITUTIONALLY ENTITLED TO THE BASIC ELEMENTS OF ADEQUATE MEDICAL TREATMENT.

III. WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE REMEDIAL ACTION OF THE DISTRICT COURT.

IV. WHETHER THE COURT OF APPEALS CORRECTLY FOUND THAT THE EVIDENTIARY RULINGS OF THE DISTRICT COURT WERE COMPATIBLE WITH THE F. R. C. P. 43 (a) AND THE BROAD DISCRETION EXTENDED IN AN EQUITABLE PROCEEDING TO A JUDGE ACTING IN HIS CAPACITY AS CHANCELLOR.

STATEMENT OF THE CASE

This class action litigation was commenced in the United States District Court for the Middle District of Alabama on behalf of all prison inmates in the Alabama Prison System. The original complaint, filed pro se, contained specific and general allegations of gross neglect of inmate patients and of medical inadequacies at the Mt. Meigs Medical and Diagnostic Center, one of several institutions in the Alabama Prison System.

The district court appointed counsel to represent the class of plaintiffs and granted the request of the United States to appear as amicus curiae. At pretrial the action was expanded to include the members of the Board of Corrections of the State of Alabama and all of the hospital and treatment facilities in the Alabama Prison System. The Court directed the case to be submitted by deposition as far as practical.

After an approximate three-day evidentiary hearing, during which in excess of fifty depositions were introduced, the district court rendered an order which included detailed findings of shockingly inadequate medical care resulting in the deprivation of basic elements of adequate medical treatment. The depositions as introduced at the hearing were from six part-time prison physicians and a full-time doctor who had recently come into the system and has now left. Depositions of three registered nurses and a clinical psychologist, all of whom were either employees or former employees of the Alabama prison system were introduced as were depositions from ten medical technical assistants (hereinafter referred to as MTA's), who were employed by the Alabama prison system and who at the time of deposition were working at Holman, Atmore, Tutwiler facilities, or in the Medical and Diagnostic Center hospital at Mt. Meigs, Alabama.

The deposition of Mr. Frank Brown, the Administrator of the Medical and Diagnostic Center (hereinafter referred to as M&DC), and of the Warden of the M&DC facility, Mr. Bill Gilmore, were also introduced. The depositions of nine prisoners from Atmore-Holman, nine prisoners from Mt. Meigs, and eight from Draper Prison, including the plaintiff, were introduced as were the actual medical records.

The district court held under the facts and circumstances of the case that constitutional deprivations were shown and thereupon entered a remedial decree.

The Court of Appeals for the Fifth Circuit affirmed on November 8, 1974.

The Order and Opinion of the district court is reported at 349 F. Supp. 278. The affirming Opinion

of the Court of Appeals for the Fifth Circuit is reported at 503 F. 2d 1320.

The Petition for a Writ of Certiorari filed by the State of Alabama was docketed in the Supreme Court of the United States on March 7, 1975.

The portion of the case involving the payment of attorneys fees and litigation expense is still before the Fifth Circuit Court of Appeals.

RESPONSE TO FACTUAL PORTION OF PETITIONERS' STATEMENT OF THE CASE

A portion of the "Statement of the Case" in the petition before this Court is actually a factual statement with regard to the medical facilities and treatment throughout the Alabama prison systems. Petitioners' factual statements are incomplete to the point of being misleading. This response is therefore necessary.

EVIDENCE OF CRITICAL MEDICAL AND TREATMENT DEFICIENCIES

The record below establishes medical deficiencies in at least the following areas of treatment, care and therapeutic programs throughout the Alabama prison medical system:

1. Totally inadequate professional staffing at the M&DC facility and throughout the prison system (no full-time physician in the entire system; one part-time retired doctor from Evergreen, Alabama serving the entire Atmore-Holman complex which contains approximately 1700 inmates or almost half of the State prison population; no RN's and only two MTA's at Atmore for 1,022 inmates and three MTA's at Hol-

man; only three RN's in the entire system who are located at the M&DC facility and who do not work after either 6:00 p.m. or 11:00 p.m., with no regular shifts on the weekends. No registered nurse at Draper. Only one MTA at Draper; no registered nurse at Tutwiler, only one MTA at Tutwiler who is not there after 2:00 p.m. on weekends. Drs. Mracek, Brock, Robertson, Alderete and Kocour all recognized the need for additional professional help. (See court testimony of Dr. Mracek, and court testimony of Dr. Alderete, court testimony of Mr. Brady as to medical vacancies and unfilled medical "slots" throughout the system.)

2. Lack of communication and organization throughout the system resulting in inmates not receiving medical care and treatment (hospital discharge summaries are insufficient to enable the referring doctor to ascertain treatment; long delays in admission to the Mt. Meigs hospital (M&DC); no hospital bylaws; no regular staff meetings or medical committee meetings). (deposition of Dr. James B. Thomas, and court testimony of Dr. Alderete.)

3. Poorly organized lines of therapeutic responsibility resulting in patients being either overlooked or neglected (MTA not knowing whether they are responsible to doctor or nurse; doctor not knowing who his subordinates are; duties and responsibilities of the medical personnel not set out in writing (Deposition of Dr. Robertson—loose and poor organization, deposition of Dr. William Brock, court testimony of Dr. Alderete).

4. Medical records, including those within the M&DC hospital are inaccurate, incomplete and are not standardized. (See deposition of Mrs. Holmes; deposition of Dr. Robertson; February 23, 1972 deposition

of Dr. Mracek; deposition of Dr. James B. Thomas; deposition of MTA Henderson; court testimony of Dr. Mracek, court testimony of Dr. Alderete).

5. Chronic shortage of medical supplies throughout the system resulting in patients either receiving no treatment at all or inadequate and improper treatment (deposition of Edward Thomas Newman, "highly inadequate drug supply"; deposition of E. E. Stacey, "rags and towels used due to no available gauze; deposition of Edward T. Newman, and court testimony of Dr. Alderete).

6. No established procedures for fire emergencies (deposition of Mrs. Holmes, RN, depositions of Dr. Mracek; court testimony of Dr. Alderete).

7. No established procedures for the maintenance of sanitation or sanitary hospital conditions. (Deposition of Mrs. Holmes; whirlpool discontinued due to "lack of adequate material to clean pool for staph infection"—medical records of Melton E. Guy, July 21, 1971 entry, plaintiffs' exhibit 4 to VanCleve deposition, maggots in bedsores, deposition of Mrs. Lynette Hetherington, maggot in mattress, deposition of John H. Clonts, court testimony of Dr. Alderete).

8. Lack of available medical doctors to the point where an emergency case may not and has not been seen by a physician for two to three days after admission to the M&DC facility (Medical records of Marvin Mayberry; medical records of Alonzo Stallworth, convict patient who wrote Warden begging to see doctor after transfer to M&DC; all part-time staff doctors recognized the need for additional physicians.) (See deposition of Edward T. Newman; court testimony of Dr. Mracek, court testimony of Dr. Alderete.)

9. Medical hold and lockup (close confinement) procedure which is segregated confinement in a small two-man cell which the inmate is allowed to leave only once each day. Patients arriving at the M&DC Hospital from Holman and Atmore are routinely placed in lockup even though they were previously in general population and such inmates may remain in lockup a few days, a few weeks or even months before they are taken to sick call or allowed to see a doctor (see deposition of James M. Sheppard, Glen McGuff, Edward Thomas Newman, Arthur Faircloth; deposition of Dr. James B. Thomas; also deposition of Edward T. Newman, and deposition of W. A. Kernop; and court testimony of Dr. Mracek, and court testimony of Dr. Alderete.)

10. Inadequate and obsolete treatment facilities at the women's prison at Tutwiler (no restraints on delivery table, paint peeling from ceiling, no facilities to resuscitate infants, drip ether administered on concrete floor, deposition of Miss Hazel M. Griffin, MTA, court testimony of Dr. Mracek; court testimony of Dr. Alderete).

11. No means to care for mentally ill patients and inadequate means to transfer the mentally ill to hospital for treatment (deposition Dr. E. J. Kocour; deposition of E. E. Stacey, MTA; deposition of Mr. Austin S. Bush, MTA, also court testimony of Dr. Mracek, and court testimony of Dr. Alderete).

12. Inadequate emergency procedures; for example, patients who are stabbed are taken from Atmore to Brewton to M&DC Hospital and on occasion then on to a private Montgomery hospital (deposition of E. E. Stacey). Example of stabbing patients actually put to bed at Mt. Meigs then taken to Montgomery hospital for sewing up (deposition of E. E. Stacey; deposition

of Harvis Whatley; medical records of Harvis Whatley, Arthur L. Krappatach and Leon Wildburger.)

13. Extensive delay in patients being admitted to M&DC hospital although a medical referral is made. Approval for transfer to M&DC can take anywhere from a few days to well over a month. (Deposition of Dr. James B. Thomas; deposition of Edward T. Newman; deposition of W. A. Kernop, and court testimony of Dr. Mracek).

14. Unsupervised inmates actually performing suturing and minor surgery on patients, giving injections, taking x-rays and administering treatment and medication (deposition of Gilbert E. McGlothern; deposition of Grady Boutwell; deposition of Arthur Faircloth; and medical records of Arthur Faircloth entry of June 1, 1971; deposition of Miss Hazel M. Griffin, MTA; court testimony of Dr. Alderete).

15. No definitive standards maintained in any area of therapeutic responsibility. For example, prison hospitals are not licensed or inspected by Alabama Department of Health or by any other control of inspecting agency either internal or external. (Court testimony of Dr. Alderete and court testimony of Dr. Mracek).

A former nurse at the M&DC hospital, Mrs. Betty B. Murphy, testified that nurses at this facility evidenced to her that they were too busy to attend a patient and that there were times when a patient's complaint was ignored; (deposition of Mrs. Murphy); that patients were not treated as human beings at times (deposition of Mrs. Murphy); and that one of the reasons she left the Mt. Meigs facility was, "I don't think you can work in a place where you feel like a person is being mistreated in one way or another." (Deposition

of Mrs. Murphy). Mrs. Murphy stated that the overlooking of a patient by medical staff may be unintentional and "I feel like there are times when it is intentional." (Deposition of Mrs. Murphy.)

A medical assistant at Mt. Meigs, Austin Bush, testified that he had tried for as long as five to six hours on occasion to locate a nurse after regular duty hours (Bush deposition). The MTA's are required to go through a nurse in seeking a doctor. Mr. Bush stated that he "hardly ever" saw the nurses on the wards. (Bush deposition).

Dr. James Mracek, the Medical Director of the Alabama prison system, testified in the district court that in his opinion substantial increases in professional staffing should be made throughout the system.

On cross examination Dr. Mracek was questioned from the medical records. The doctor stated that while he was not personally familiar with the records that some of the problems presented thereby would be alleviated by additional staffing, more medical assistants and more doctors. Dr. Mracek stated that there were no established procedures for the maintenance of sanitation throughout the hospital system; no established procedures for fire evacuation or control; that there were no guidelines in existence beyond which an inmate patient who was medically recommended for admission to the M&DC hospital would be required to wait for admission; that inmates coming into M&DC are placed in "medical hold" which is a lock-up area without any definite timetable pursuant to which they may see a physician or receive treatment. Dr. Mracek affirmed that there were no medical assistants assigned to the road camps and that he, as medical director, had not talked with any of the doctors who are supposed to

render services on a call basis to the road camp inmates. Dr. Mracek testified that he, as medical director, made sick call at Draper prison at 5:30 a.m., then routinely would come to M&DC for his administrative functions as medical director and in addition that he would have to attend to his private medical practice.

One of the doctors assigned to M&DC hospital facility refused to take alternate night calls. Dr. Mracek admitted that some of the medical records at M&DC were poorly kept. Dr. Mracek testified that the Alabama State Hospital Licensee Regulation would be an acceptable minimum standard but that the M&DC hospital did not meet such standards.

REASONS FOR DISALLOWANCE OF WRIT

I

THE COURT OF APPEALS CORRECTLY HELD THAT A THREE-JUDGE COURT IS NOT REQUIRED UNDER 28 U.S.C. 2281 WHERE NO STATE STATUTE OR REGULATION IS AFFECTED BY THE LITIGATION AND WHEN NO UNIFORM STATE PRACTICE EXISTED PRIOR TO THE LITIGATION.

Both the Court of Appeals and the district court below found an absolute lack of uniform practices and procedures in the administration of medical care to inmates incarcerated in the Alabama Penal System (APS). The Court of Appeals significantly wrote that it would be "sheer sophistry" to suppose that the Alabama Board of Corrections would undertake to prescribe, for example, such practices as the supply of gauze and drugs available to inmates (which the district court found to be severely limited to the point of

rags being used as a substitute for gauze sponges and prescription drugs being frequently unavailable and simple items such as aspirin and anti-acids being lacking in some prisons for weeks at a time [349 F. Supp. at p. 283]), or the hours during which licensed medical personnel would be available to render treatment (which the district court found to be severely limited in varying degrees depending on the prison involved) or to "mandate the inordinate delays to which emergency patients would be subjected". Varying degrees of medical inadequacy were found to exist at the various penal institutions throughout the State of Alabama.

One of the glaring deficiencies uncovered in this case and which was found to have resulted in deplorable human misery, was the absolute lack of state statutory or state regulatory guidelines or procedures to insure even minimumly constitutional medical care for the inmates incarcerated by APS. The district court found "neglect of basic medical needs of prisoners that could justly be called 'barbarous' and 'shocking to the conscience' ". 349 F. Supp. at p. 281.

The district court cited from the evidentiary record numerous examples of medical, therapeutic and patient administrative areas where absolutely no medical regulations, procedures or practices were in existence: *no* hospital by-laws; *no* regular medical staff meetings; *no* written responsibilities of medical personnel; *no* standard sanitary procedure followed in hospitals or infirmaries; *no* fire or disaster plan for evacuation of any of the hospital facilities; *no* periodic health inspection; *no* fire and safety inspections; *no* standardization of medical records; *no* standard procedure for the availability of doctors or nurses.

This Court in *Wolff v. McDonnell*, ...U. S....., 41

L. Ed 2d 935, 94 S. Ct. 2963 (1974) held that where no uniform or statewide regulations concerning the operation of prisons were involved, there was no need to convene a three-judge court under 28 U.S.C. 2281 (Note 1, 94 S. Ct. at p. 2968).[1] The Alabama Board of Corrections has long had the authority to promulgate uniform and statewide rules and regulations governing prison medical care (Tit. 45 § 3, Code of Alabama 1940, Recompiled 1958). The record, however, totally fails to show any implementation by the Board of Corrections whatsoever, through rule, regulation, practice or otherwise.

The petitioners recognize that there were *no* statewide regulations concerning medical care of inmates in the Alabama Prison System. Yet they contend that the case *sub judice* was a constitutional attack on the enabling statute which had never been followed or implemented by APS. The reasoning of the petitioners is indeed falacious. The order of the district court did not hold the enabling statute unconstitutional. The statute was not attacked and has not been extracted by the relief granted. The orders below cannot possibly be said "to paralyze totally the operation of an entire regulatory scheme" as petitioners contend. Both orders below find an absolute lack of any "regulatory scheme". The district court and the Court of Appeals

---

[1] Petitioners cite *Baker v. Estelle*, 491 F. 2d 428 (5 Cir. 1974) and *Sands v. Wainwright*, 491 F. 2d 417 (5 Cir. 1974) cert denied; *Guajardo v. Estelle*, ...U. S....., 94 S. Ct. 2403, 40 L. Ed 2d 771 (1974) as authority for requiring the convening of a three-judge court. The Court of Appeals however, effectively and correctly distinguished both of these cases which involved established, ordained or promulgated prison regulations from the case *sub judice* which involves an absolute lack of established, uniform or recognized statewide regulations, procedures, or practices.

find glaring and shocking constitutional deprivation and properly prescribed remedial standards to insure constitutionally minimum health care to the inmates in APS.

II

THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY FOUND THAT STATE PRISON INMATES ARE CONSTITUTIONALLY ENTITLED TO THE BASIC ELEMENTS OF ADEQUATE MEDICAL TREATMENT.

The findings of the district court detail and describe glaring and shocking inadequacies in the medical treatment afforded to inmates incarcerated in APS.[2] The district court described the profound cumulative effects of the medical deficiencies, i.e., prisoners waiting weeks and sometimes months to see a doctor; sick inmates placed in lock up (segregated confinement out of prison population and not in hospital area) wherein they remained a "few weeks or even months before they are taken to sick call or allowed to see a doctor with some being returned to their prison

---

[2] For example: "cronic shortage of medical supplies throughout the system"; limited medical personnel and doctors; rags used as substitute for gauze; out of date drugs administered; oxygen tanks in ambulances remaining empty; patients neglected and doctors' orders rarely carried out; no medical personnel assigned to prison facilities housing more than 800 inmates; no sterilizer in minor surgery room at one institution; unsanitary kitchen conditions; unsupervised prisoners regularly pulling teeth, performing minor surgery, screening sick call, dispensing and administering medication and giving injections, etc., maggots in bed sores from lack of attention; emergency care "undeserving of the name"; patients sent to hospital and not seeing a doctor for two days and then only shortly before death.

institution never having been examined by any member of a medical staff"; open wounds becoming infested with maggots from lack of care; "the result is frequently permanent injury and even death".

The district court found and concluded that the neglect of the basic medical needs of prisoners could justly be called "barbarous" and "shocking to the conscience". The petitioners in the face of the record in this case and in spite of the detailed and specific findings of the Court below with which they do not take issue, now contend that "the question of adequacy and propriety of medical treatment and care of inmates in the Alabama Prison System is not properly within the jurisdiction of federal courts". (Petition for a writ of Certiorari p. 15)

When this contention is analyzed it is apparent that the petitioners would have had the courts below either totally ignore the mandates of the Eighth and Fourteenth Amendments to the Constitution of the United States or to have held that the shockingly inadequate medical treatment which was found to exist was a necessary or essential concomitant of incarceration.

Of course, neither of these positions can bear constitutional scrutiny. Nothing could be more cruel or unusual than the denial of basic medical treatment to the sick and suffering. In a civilized society such deprivations cannot and must not ever be held a necessary or essential concomitant of incarceration.

This Court has consistently recognized federal jurisdiction to inquire into constitutionally founded grievances of persons incarcerated in prison. *Cruz v. Beto,* 405 U. S. 319, 31 L. Ed 2d 263, 92 S. Ct. 1079; *Haines v. Kerner,* 404 U. S. 519, 30 L. Ed 2d 652, 92 S. Ct. 594; *Robinson v. California,* 370 U. S. 660, 82

S. Ct. 1417, 8 L. Ed 2d 758; *Wolff v. McDonnell*, ...U. S....., 94 S. Ct. 2963, 41 L. Ed 2d 935 (1974). In the recent decision of *Procunier v. Martinez*, ...U. S....., 94 S. Ct. 1800, 1807, 40 L. Ed 2d 224 (1974), this Court through Mr. Justice Powell held:

> . . . a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights. Johnson v. Avery, 393 U. S. 483, 486, 21 L. Ed 2d 718, 89 S. Ct. 747 (1969). This is such a case.

It is well established that prisoners do not lose all their constitutional rights by their incarceration. *Washington v. Lee*, 263 F. Supp. 327, 331 (M. D. Ala. 1966), aff'd per curiam, 390 U. S. 333, 88 S. Ct. 994, 19 L. Ed 2d 1212 (1968).

The findings of the courts below as supported by the record, overwhelmingly establish a total failure on the part of APS to take cognizance of the valid constitutional and fundamental rights to basic and minimumly adequate medical care. The challenge of the petitioners to the Orders below are not constitutionally substantial and cannot be sustained.

III

THE COURT OF APPEALS CORRECTLY AFFIRMED THE REMEDIAL ACTION OF THE DISTRICT COURT.

The constitutional deprivation in the case *sub judice*

were carefully detailed and analyzed in the courts below. In light of these findings a general decree to provide adequate medical care could not be reasonably expected to afford meaningful relief.

The Court of Appeals upon noting the shocking inadequacies and shortcomings in the medical treatment afforded by APS which have been "judicially acknowledged to raise the spectre of constitutional infirmity", observed that there was a striking congruity between the relief ordered by the district court and the various improvements which were desired by the Medical Director of the APS.

The Opinion of the Court of Appeals found the district court's decree well tailored to ameliorate the existing unconstitutional deficiencies. The Court further noted that the district court decree was far from being intrusive since the measures formulated leave virtually all the initiative with the Alabama Prison System. *Newman v. State of Alabama,* 503 F. 2d 1332. The Circuit Court found three provisions of the district court's decree to envision pervasive, though necessary changes. The Court noted these provisions as follows:

> (1) the submission of plans for improvement of each facility, (2) the submission of similar plans for staffing at each facility, and (3) the evaluation of Mt. Meigs to the standards enunciated in the Proposed Revised Regulations for Participation of Hospitals in Medicare. The former two requirements vest the ASP with the initiative in the first instance. The latter requirement, though quite specific, was imposed only when appellants were remiss in submitting proposed standards requested by the court at the termination of the evidentiary hearing.

Thus the only specific directive by the district court was concerning the elevation of the Medical and Diagnostic Center at Mt. Meigs to the standards in the proposed revised regulations for participation of hospitals and Medicare. Dr. Alderete, the Medical Director of the United States Penitentiary Hospital in Atlanta, Georgia, testified that these standards were minimally adequate and that they were applicable to prison hospitals. While Dr. Mracek, the Medical Director of the Alabama Prison System, testified that the Alabama State Hospital Licensee regulations would be an acceptable minimum standard, he acknowledged that the Medical and Diagnostic Center Hospital did not meet such standards.

The petitioners now seem to contend that the remedial relief granted was beyond the equitable powers of the district court. This contention completely loses sight of the well-established principle that once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad. In specifically holding that breadth and flexibility are inherent in the equitable remedies this Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 28 L. Ed 2d 554, 91 S. Ct. 1267, recognized:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjudgment and reconciliation between the public interest and the private needs. . . . Hecht Co. v. Bowles, 321 U. S. 321, 329-330, 88 L. Ed 754, 760, 64 S. Ct. 587 (1944)

We respectfully submit that the courts below made proper and necessary utilization of their remedial power which was coterminous with the scope of the constitutional violations found to exist.

IV

THE COURT OF APPEALS CORRECTLY FOUND THAT THE EVIDENTIARY RULINGS OF THE DISTRICT COURT WERE COMPATIBLE WITH F. R. C. P. 43 (a) AND THE BROAD DISCRETION EXTENDED IN AN EQUITABLE PROCEEDING TO A JUDGE ACTING IN HIS CAPACITY AS CHANCELLOR.

There was no error in allowing a physician who personally inspected the prison medical facilities, to express an opinion of medical inadequacy which was substantiated by the expert's review of medical records, depositions and other evidence introduced at trial.

The petitioners raised several evidentiary matters in the Court of Appeals (Slip Opinion of Court of Appeals page 788) only one of which is contained in the present Petition for Writ of Certiorari. The Court of Appeals found that all evidentiary rulings were compatible with F. R. C. P. 43 (a) and with the broad discretion extended in equitable proceedings to a judge acting in his capacity as Chancellor.

The testimony which the petitioners now attack concerns the expert opinion of Dr. Joseph Alderete, the physician testifying in the district court who was the Hospital Director for the United States Penitentiary Hospital in Atlanta, Georgia.

Dr. Joseph F. Alderete, Hospital Director for the United States Penitentiary Hospital, testified during

the trial that he had made personal inspections of the prison hospitals and infirmaries throughout the State of Alabama. This witness stated that he knew of the professional staffing through the sworn answers by the defendants to interrogatories. Dr. Alderete testified that he had also reviewed the hospital records which were introduced into evidence. The witness specifically testified on direct examination that he based his opinion and analysis on personal observation and was then asked to express his opinion as to the level of medical care offered in the prison system. The State objected on the grounds that the question "invades the province of the Court". On cross examination by the State, Dr. Alderete testified that in his opinion inadequacy was "substantiated" by his review of hospital records as introduced into evidence and by a review of depositions which were also introduced into evidence.

We respectfully submit that the admission of this testimony was well within the discretion of the trial court and cannot be said to be "manifestly erroneous". *Salem v. United States Lines Co.*, 370 U. S. 31, 35, 82 S. Ct. 1119, 8 L. Ed 2d 313 (1962). It is interesting to note that, while occuring after the decree of the district court, a survey team of the Medical Association of Alabama confirmed the appraisal rendered by Dr. Alderete. (Slip Opinion of the Court of Appeals p. 781)

CONCLUSION

The respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Joseph D. Phelps
Attorney for Respondents

APRIL, 1975

CERTIORARI DENIED